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**IN THE
COURT OF APPEALS OF INDIANA**

JESSICA BOWLING,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 35A04-0612-CR-715
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE HUNTINGTON CIRCUIT COURT
The Honorable Thomas M. Hakes, Judge
Cause No. 35C01-0510-FB-75

March 12, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Jessica Bowling appeals her advisory sentence of ten years for Burglary as a Class B felony. Specifically, she contends that the trial court erred in finding and weighing the aggravating and mitigating circumstances and that her sentence is inappropriate in light of the nature of her offense and her character. Following *McMahon v. State*, 856 N.E.2d 743 (Ind. Ct. App. 2006), we review sentences under a single standard: inappropriateness. Although the trial court did not abuse its discretion in finding and weighing the aggravating and mitigating circumstances, given the minimally offensive nature of Bowling's crime, we conclude that Bowling's sentence is inappropriate and therefore revise it to the minimum sentence of six years.

Facts and Procedural History

On October 25, 2005, the State charged Bowling with Burglary as a Class B felony and Residential Entry. Thereafter, Bowling pled guilty to Burglary as a Class B felony.¹ She also pled guilty to Trafficking with an Inmate as a Class C felony in Cause No. 35C01-0510-FC-72.² In exchange, the State agreed to dismiss the residential entry charge, to cap the burglary sentence at ten years and the trafficking sentence at four years, and that the sentences in both cause numbers would run concurrently.³ The facts

¹ Ind. Code § 35-43-2-1(B)(i).

² Bowling is also appealing her sentence for trafficking with an inmate under Court of Appeals Cause No. 35A02-0612-CR-1121. There is only one transcript for both appellate cause numbers. Therefore, our references to the transcript in this case are to the transcript in Court of Appeals Cause No. 35A02-0612-CR-1121.

³ We note that Bowling did not include a copy of her plea agreement in her appendix. Nevertheless, the trial court recited the terms of Bowling's plea agreement at the sentencing hearing.

relevant to the burglary charge, as recited by the State and agreed to by Bowling at the guilty plea hearing, are as follows:

[D]uring the month of August, 2005, the defendant went to Megan Anderson's home along with her husband Tristan Bowling and the two entered the house through an unlocked back door to sleep and eat at Megan's house without her permission. Tristan and the defendant stayed the night at this house and while the defendant was there, she ate the food that did not belong to her.

Tr. p. 51. In imposing Bowling's sentence, the trial court did not identify any aggravators or mitigators. Rather, the court noted that it had considered "the pre-sentence report, the statements and the plea agreement. Having done so, I order the advisory sentence of ten years in cause number 0510-FB-75 and the advisory sentence of four years in cause number 0510-FC-72. The time in these cases shall be served concurrent to one another." *Id.* at 61. Bowling now appeals her sentence for burglary.

Discussion and Decision

On appeal, Bowling contends that the trial court erred in finding and weighing the aggravating and mitigating circumstances and that her sentence is inappropriate in light of the nature of her offense and her character. In 2005, the Indiana General Assembly amended Indiana Code § 35-38-1-7.1(d) (2006), which now provides that a trial court may impose any sentence that is authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Under this new sentencing scheme, a defendant may no longer bring a claim regarding aggravators and mitigators that is separate and independent from a claim that her sentence is inappropriate under Indiana Appellate Rule 7(B). *See McMahon v. State*, 856 N.E.2d 743, 748-49 (Ind. Ct. App. 2006). Rather, we

review sentences under a single standard: inappropriateness. *Id.* at 752. The burden is on the defendant to persuade the appellate court that her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). In assessing the appropriateness of sentences under Indiana Appellate Rule 7(B), we will review the aggravating and mitigating circumstances identified, or not identified, by the trial court. *McMahon*, 856 N.E.2d at 748; *Gibson v. State*, 856 N.E.2d 142, 147 (Ind. Ct. App. 2006). In doing so, we apply an abuse of discretion standard. *Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005).

Here, Bowling pled guilty to burglary as a Class B felony. Indiana Code § 35-50-2-5 provides, in pertinent part: “A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.” The trial court sentenced Bowling to the advisory term of ten years. Bowling makes several arguments regarding her sentence, which we restate as: (1) the trial court erred in weighing her criminal history; (2) the trial court failed to identify three valid mitigating circumstances; and (3) her sentence is inappropriate in light of the nature of her offense and her character.

I. Aggravating and Mitigating Circumstances

Bowling’s first argument is hard to follow in that she argues that her “criminal history needs to be weighed along with the potential mitigators.” Appellant’s Br. p. 5. It is unclear whether Bowling is arguing that the trial court gave too much aggravating weight to her criminal history or that the court should have considered her lack of a relevant criminal history as a mitigator. Regardless, the record shows that Bowling, who

was twenty-three years old at the time of sentencing, had the following misdemeanor convictions: Maintaining a Common Nuisance, Possession of Marijuana, False Informing, and Reckless Possession of Paraphernalia—all in 2002. Bowling also violated her probation on two occasions in 2005 and pled guilty to trafficking with an inmate at the same time she pled guilty to burglary in this case.⁴ Additionally, there was a Neglect of a Dependent charge as a Class A felony charge pending against Bowling at the time of her sentencing in this case.⁵ In sentencing Bowling to the advisory term of ten years, the trial court did not identify Bowling's criminal history as an aggravator. Therefore, the court did not accord it too much aggravating weight. Furthermore, Bowling's criminal history is not insignificant; therefore, the trial court did not abuse its discretion in not identifying it as a mitigator either.

Next, Bowling argues that the trial court failed to identify as a mitigator the undue hardship that her incarceration would create for her child. The record discloses that Bowling had two daughters, one of whom was deceased. According to the Presentence Investigation Report, Bowling was unemployed, and Bowling's mother was supporting Bowling's daughter. Thus, Bowling's claim that incarceration would cause undue hardship for her child is highly disputable. In addition, jail is always a hardship on dependents, and Bowling fails to explain how her advisory ten-year sentence is more of a hardship on her child than would be the minimum six-year sentence. *Vazquez v. State*,

⁴ The record shows that the burglary in this case occurred in August 2005 and that the trafficking with an inmate occurred in July 2005.

⁵ The trial court sentenced Bowling on burglary on July 17, 2006, and the Presentence Investigation Report shows that Bowling's jury trial for neglect of a dependent was set for the week of August 21, 2006.

839 N.E.2d 1229, 1234 (Ind. Ct. App. 2005), *trans. denied*. As such, the trial court did not abuse its discretion in failing to identify this as a mitigator.

In addition, Bowling argues that the trial court should have considered her remorse as a mitigator. At the sentencing hearing, Bowling testified as follows:

As far as the burglary goes I realize that I acted on poor judgment but if [sic] it wasn't intended to be a malicious act. I wasn't trying to hurt that girl or take anything from her. It was just stupid and I regret it and I am sorry. That's all.

Tr. p. 58. The trial court heard this testimony but declined to find Bowling's alleged remorse as a mitigator. The Indiana Supreme Court has stated that the trial court's determination regarding remorse is similar to a determination of credibility. *Pickens v. State*, 767 N.E.2d 530, 535 (Ind. 2002). In the absence of evidence of some impermissible consideration by the trial court, we accept its determination of credibility. *Id.* We find no impermissible considerations. The trial court did not abuse its discretion in failing to consider this mitigator.

Finally, Bowling argues that the trial court should have considered her guilty plea as a mitigator. "A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and extends a benefit to the State and to the victim or the victim's family by avoiding a full-blown trial." *Francis v. State*, 817 N.E.2d 235, 237-38 (Ind. 2004). "[A] defendant who willingly enters a plea of guilty has extended a substantial benefit to the [S]tate and deserves to have a substantial benefit extended to him in return." *Id.* at 237 (quoting *Scheckel v. State*, 655 N.E.2d 506, 511 (Ind. 1995)). However, a trial court does not abuse its discretion by not finding a guilty plea as a mitigating factor when a

defendant receives a substantial benefit for pleading guilty. *Sensback v. State*, 720 N.E.2d 1160, 1165 (Ind. 1999); *see also Francis*, 817 N.E.2d at 238 n.3.

Here, the record reveals that in exchange for Bowling's plea of guilty to burglary, the State dismissed a residential entry charge, agreed to cap her sentences for burglary and trafficking at the advisory levels, and agreed that the sentences would run concurrently. Because Bowling received a substantial benefit from her decision to plead guilty, the trial court did not abuse its discretion by failing to give her guilty plea any mitigating weight.

II. Appropriateness of Bowling's Sentence

Although the trial court did not abuse its discretion in failing to find any mitigators, we must nonetheless conclude that Bowling's sentence is inappropriate in light of the nature of her offense and her character. *See McMahon*, 856 N.E.2d at 748; *see also* Ind. Appellate Rule 7(B). Bowling's crime, though it is a Class B felony, is minimally offensive in that after Bowling and her then-husband entered a house through an unlocked door, they simply stayed the night there and ate some food. No one was injured. Further, there is no indication that anyone was home at the time. As to Bowling's character, the record shows that Bowling, who was twenty-three years old at the time of sentencing, had four misdemeanor convictions and two probation violations, had pled guilty to trafficking with an inmate as a Class C felony, and had a neglect of a dependent as a Class A felony charge pending against her.⁶ Although Bowling's

⁶ According to the Offender Search on the Indiana Department of Correction website, Bowling was convicted of Neglect of a Dependent as a Class A felony and sentenced to forty years on September 19, 2006.

criminal history is not insignificant, we point out that the trial court did not find it aggravating. Given the mild nature of her offense and her character, we conclude that Bowling's advisory sentence of ten years is inappropriate and therefore revise it to the minimum sentence of six years.

Reversed.

BARNES, J., concurs.

BAILEY, J., concurs in result.